

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America,)	No. CV 11-1553-PHX-JAT (JRI)
)	
Plaintiff,)	No. CR 07-798-PHX-EHC
)	
v.)	ORDER
)	
Armando Ramirez-Valadez,)	
)	
Defendant/Movant.)	
)	

On August 8, 2011, Movant Armando Ramirez-Valadez, who is confined in the Management & Training Corporation's Giles W. Dalby Correctional Facility in Post, Texas, filed a *pro se* Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. The Court will call for an answer to the § 2255 Motion.

I. Procedural History

Without the benefit of a plea agreement, Movant pled guilty to Illegal Re-entry After Deportation, in violation of 8 U.S.C. § 1326(a), with sentencing enhancement pursuant to 8 U.S.C. § 1326(b)(2). On June 17, 2008, the Court sentenced Movant to a 70-month term of imprisonment followed by 36 months on supervised release.

On June 30, 2008, Movant filed a Notice of Appeal. In an April 1, 2011 Memorandum, the Ninth Circuit Court of Appeals affirmed Movant's conviction.

II. Section 2255 Motion

In his § 2255 Motion, Movant raises seven grounds for relief:

- (1) He was denied his rights to the effective assistance of counsel and due process because his attorney failed to conduct a thorough investigation

1 and interrogate witnesses, failed to submit a memorandum seeking the
2 suppression of “frivolous” evidence, and failed to apprise Movant of his
“substantive rights and potential defenses.”

3 (2) He was denied his rights to the effective assistance and due process
4 because his attorney failed to file a notice of appeal at Movant’s
5 request,¹ seek a speedy trial, request Brady material, and submit
6 “3553(a) factors that would have justified a sentencing downward
departure” based on the insufficiency of the evidence against him.
Movant also asserts that his attorney engaged in illegal, unethical, or
dishonest conduct to induce Movant to enter into a plea agreement.

7 (3) He did not knowingly and voluntarily enter into the plea agreement
8 because the District Court failed to advise him of his trial rights and his
9 rights under Rule 11 of the Federal Rules of Civil Procedure. Movant
also claims that he did not validly waive the right to appeal his sentence
and the manner in which it was determined.²

10 (4) A prior felony conviction is an element of the offense, rather than a
11 sentencing enhancement.

12 (5) “The U.S.S.G. on cultural assimilation as a commentary amendment
13 may be considered for a modification of sentence under the authority
of Title 18 U.S.C.A. § 3582(c)(2).”

14 (6) Movant is entitled to a downward departure because he is a deportable
alien.

15 (7) “The District Court committed procedural error by failing to
16 acknowledge and address [Movant’s] nonfrivolous fast-track disparity
17 argument in support of a below-guideline sentence.” Movant also
claims that there was procedural error because the District Court failed
to adequately explain its sentence.

18 The Court will require a response to the § 2255 Motion.

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23 ¹This is untrue. Movant’s attorney filed the June 30, 2008 Notice of Appeal.

24 ²Because Movant pled guilty without the benefit of a plea agreement, it is unclear
25 when he waived his right to appeal his sentence and the manner in which it was determined.
26 Movant filed an appeal and the Ninth Circuit rejected his claims on the merits. Movant
27 raised two issues in his appeal: whether “his plea [was] invalid because the district court’s
28 failure to inform him of his trial rights meant that he did not intelligently enter his plea,” and
whether his conviction was valid because “the district court failed to advise him of certain
rights pursuant to Rule 11.” The Court of Appeal rejected both issues, concluding that
Movant’s plea was voluntarily and intelligent and his conviction was valid.

1 **III. Warnings**

2 **A. Address Changes**

3 Movant must file and serve a notice of a change of address in accordance with Rule
4 83.3(d) of the Local Rules of Civil Procedure. Movant must not include a motion for other
5 relief with a notice of change of address. Failure to comply may result in dismissal of this
6 action.

7 **B. Copies**

8 Movant must serve Respondent, or counsel if an appearance has been entered, a copy
9 of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a certificate
10 stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also, Movant must submit
11 an additional copy of every filing for use by the Court. LRCiv 5.4. Failure to comply may
12 result in the filing being stricken without further notice to Movant.

13 **C. Possible Dismissal**

14 If Movant fails to timely comply with every provision of this Order, including these
15 warnings, the Court may dismiss this action without further notice. See Ferdik v. Bonzelet,
16 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to
17 comply with any order of the Court).

18 **IT IS ORDERED:**

19 (1) The Clerk of Court must serve a copy of the § 2255 Motion (Doc. 1 in CV-11-
20 1553-PHX-JAT (JRI)) and this Order on the United States Attorney for the District of
21 Arizona.

22 (2) The parties and the Clerk of Court **must file** all documents related to the § 2255
23 Motion in the **civil case**.

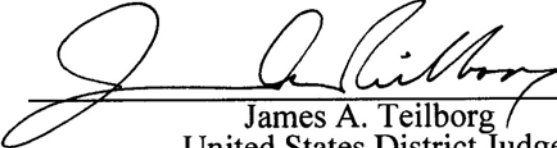
24 (3) The United States Attorney for the District of Arizona has **60 days** from the
25 date of service within which to answer the § 2255 Motion. The United States Attorney may
26 file an answer limited to relevant affirmative defenses, including but not limited to, statute
27 of limitations, procedural bar, or non-retroactivity. If the answer is limited to affirmative
28 defenses, only those portions of the record relevant to those defenses need be attached to the

1 answer. Failure to set forth an affirmative defense in an answer may be treated as a waiver
2 of the defense. Day v. McDonough, 547 U.S. 198, 209-11 (2006). If not limited to
3 affirmative defenses, the answer must fully comply with all of the requirements of Rule 5 of
4 the Rules Governing Section 2255 Cases.

5 (4) Movant may file a reply within **30 days** from the date of service of the answer
6 to the § 2255 Motion.

7 (5) The matter is referred to Magistrate Judge Jay R. Irwin pursuant to Rules 72.1
8 and 72.2 of the Local Rules of Civil Procedure for further proceedings and a report and
9 recommendation.

10 DATED this 11th day of August, 2011.

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14 James A. Teilborg
United States District Judge